



FH

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

CWK/150323

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**PRELIMINARY RECITALS**

Pursuant to a petition filed June 27, 2013, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Kenosha County Human Service Department in regard to Medical Assistance, a hearing was held on July 25, 2013, at Kenosha, Wisconsin.

The issue for determination is whether the agency properly denied the Petitioner's request for Tomatis therapy.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street  
Madison, Wisconsin 53703

By: Karen Mayer

Kenosha County Human Service Department  
8600 Sheridan Road  
Kenosha, WI 53143

**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Kenosha County.
2. On February 28, 2013, the Petitioner submitted a request for funding of Tomatis therapy at the Spectrum Center in New York.

3. Tomatis therapy is a program of sound stimulation, audio-vocal work and counseling to train and develop listening and listening related skills. It is one method of Auditory Integration Training (AIT).
4. The Department of Health Services has determined that Sensory Integration Methods, including Tomatis, are experimental but have scheduled hearing and meetings in October, 2013 for its Treatment Intervention Advisory Committee to consider additional evidence regarding these methods.
5. On May 21, 2013, the agency denied the request for service effective May 30, 2013 based on its determination that the treatment is experimental.
6. On June 27, 2013, an appeal was filed on behalf of the Petitioner with the Division of Hearings and Appeals.

### **DISCUSSION**

In determining whether to grant a request for funding of services, the agency must always follow the general guidelines in §HFS 107.02(3)(e). That subsection provides that the agency, in reviewing requests, must the medical necessity of the service:

"Medically necessary" is defined in the Code as follows:

- (a) Required to prevent, identify or treat a recipient's illness, injury or disability; and
- (b) Meets the following standards:
  1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
  2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider, and the setting in which the service is provided;
  3. Is appropriate with regard to generally accepted standards of medical practice;
  4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
  5. *Is of proven medical value or usefulness and, consistent with s. HFS 107.035, is not experimental in nature;*
  6. Is not duplicative with respect to other services being provided to the recipient;
  7. Is not solely for the convenience of the recipient, the recipient's family, or a provider;
  8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
  9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

See Wis. Admin. Code § HFS 101.03(96m). (Italicized for emphasis). The Wisconsin Administrative Code, at DHS 107.035(1) and (2) speaks to the definition and identification of experimental services:

- (1) DEFINITION. "Experimental in nature," as used in s. DHS 107.03(4) and this section, means a service, procedure or treatment provided by a particular provider which

the department has determined under sub. (2) not to be a proven and effective treatment for the condition for which it is intended or used.

(2) DEPARTMENTAL REVIEW. In assessing whether a service provided by a particular provider is experimental in nature, the department shall consider whether the service is a proven and effective treatment for the condition which it is intended or used, as evidenced by:

- (a) The current and historical judgment of the medical community as evidenced by medical research, studies, journals or treatises;
- (b) The extent to which Medicare and private health insurers recognize and provide coverage for the service;
- (c) The current judgment of experts and specialists in the medical specialty area or areas in which the service is applicable or used; and
- (d) The judgment of the MA medical audit committee of the state medical society of Wisconsin or the judgment of any other committee which may be under contract with the department to perform health care services review within the meaning of s. 146.37, Stats.

See Wis. Adm. Code, § DHS 107.035(2).

The agency has the burden of going forward to establish that its determination is correct. In this case, the agency submitted information to demonstrate that DHS has determined Tomatis therapy to be experimental. The burden then shifts to the recipient and the recipient's provider to establish the medical necessity of the requested MA services and/or equipment. Like most public assistance benefits, the burden of demonstrating eligibility for any particular benefit or program falls on the applicant, *Gonwa v. Department of Health and Family Services*, 2003 WI App 152, 265 Wis.2d 913, 668 N.W.2d 122 (Ct.App.2003).

My decision in this case is to defer to the agency on this matter. In a decision dated August 21, 2006, ALJ Brian Schneider in Decision MPA-20/77949 stated the following;

The problem is that I see no authority for the Division of Hearings and Appeals to reverse the department's conclusion that the service is experimental. Nothing in §HFS 107.035 suggests that the department's determination is appealable. The code makes clear that if a service is determined to be experimental, it is not covered by MA. Thus the issue before me is whether this requested service is one that has been deemed to be experimental. The answer is that it is such a service, and thus I must conclude that it is not covered by MA.

This result only makes sense. The Division of Hearings and Appeals does not have the expertise to review medical treatises and other such documentation to determine if the department's review and determination were correct. It is up to the medical community to convince the department that the service should be removed from the "experimental" designation.

Thus, the only issue I have authority to determine is whether DHS has in fact determined that Tomatis therapy is experimental. Because it has made that determination, I must find that MA does not cover the service.

I note that the DHS' TIAC committee is in the process of deciding whether the therapy will remain "experimental" and the Petitioner's mother has indicated that DHS informed her she may submit information or arguments to the committee for its determination.

### **CONCLUSIONS OF LAW**

The Children's Long Term Support Medicaid Waiver correctly denied the Petitioner's request for funds for Tomatis therapy because DHS has determined that the program is experimental as that term is defined in Wis. Admin. Code, § DHS 107.035.

**THEREFORE, it is**

**ORDERED**

That the petition be, and hereby is, dismissed.

### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

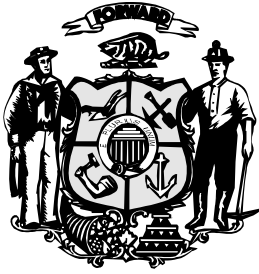
The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 17th day of September, 2013

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\sDebra Bursinger  
Administrative Law Judge  
Division of Hearings and Appeals





**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on September 17, 2013.

Kenosha County Human Service Department  
Bureau of Long-Term Support